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Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

October Term, 1997

CYNTHIA M. STONER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For statute of limitations purposes, must an indictment charging a conspiracy under 18 U.S.C. § 371 allege at least one specific overt act occurring within the limitations period established by 18 U.S.C. § 3282?

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PETITION FOR A WRIT OF CERTIORARI

Cynthia M. Stoner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review its decisions of October 10, 1996, and April 7, 1998, affirming the judgment of the United States District Court for the Western District of Oklahoma, in order to resolve the conflict between the Fifth, Seventh, Tenth, and Eleventh Circuit Courts of Appeal.

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OPINIONS BELOW

The principal opinion that gives rise to this Petition is *United States v. Stoner*, 98 F.3d 527 (10th Cir. 1996). It is reproduced in the appendix at page 1a. The order of the Tenth Circuit on rehearing is *United States v. Stoner*, 139 F.3d 1343 (10th Cir. 1998) (per curiam) (en banc). It is reproduced in the appendix at page 44a.

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JURISDICTION

The petitioner was indicted in federal district court on March 16, 1994. On June 21, 1994, a jury convicted her of conspiracy. The district court entered judgment and sentence October 5, 1994. An amended judgment and sentence was entered October 21, 1994.

A timely appeal was taken to the United States Court of Appeals for the Tenth Circuit. On October 10, 1996, a divided panel of that Court issued its opinion affirming the conviction.

The Tenth Circuit granted rehearing en banc. On April 7, 1998, an evenly divided Court entered a per curiam en banc order affirming the district court's judgment.

This petition for a writ of certiorari is filed within ninety days of April 7, 1998, pursuant to Rule 13 of the Rules of the Supreme Court.

This Court may exercise jurisdiction in this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

United States Code, Title 18, § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

United States Code, Title 18, § 3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

The petitioner was indicted on a charge of conspiracy (18 U.S.C. § 371) to embezzle from an Indian tribal account and three substantive counts of embezzlement from the same accounts (18 U.S.C. §§ 2 & 1163). She was acquitted of the substantive counts, but convicted of the conspiracy count.

Each of the overt acts alleged in the indictment occurred more than five years prior to the date of the indictment. After a jury was seated, the petitioner moved to dismiss the conspiracy count on statute of limitations grounds. App. C, pp. 34a-38a. The district court determined that the federal circuit courts of appeal were divided on the question, but it denied the motion to dismiss. App. B, pp. 30a-33a.

A divided panel of the Tenth Circuit Court of Appeals held that language in the indictment gave the petitioner notice that the government could prove the conspiracy with other overt acts that were within the limitations period. However, it is those acts that the petitioner was either acquitted of committing, or had no notice of. The panel's opinion notes the division among the other federal circuit courts of appeal on the question. A dissenting opinion was filed. App. A, pp. 1a-29a.

The appellate court granted rehearing en banc, but after additional briefing and oral argument, the court was evenly divided, 6-6, thus affirming by default the district court. App. E, pp. 44a-45a.

REASONS TO GRANT THE WRIT

The decision below is in direct conflict with *United States v. Davis*, 533 F.2d 921 (5th Cir. 1976), and *United States v. Butler*, 792 F.2d 1528 (11th Cir.), *cert. denied*, 479 U.S. 933 (1986). This is a reason to grant certiorari. *See* Rule 10(a), Rules of the United States Supreme Court.

In *Davis*, the Fifth Circuit held that:

> the government in order to avoid the bar of the limitation period of § 3282 must show the existence of the conspiracy within the five years prior to the return of the indictment, and must *allege* and prove the commission of at least one overt act by one of the conspirators within that period in furtherance of the conspiratorial agreement.

533 F.2d at 926 (citations omitted) (emphasis added).

In *Butler*, the Eleventh Circuit held that:

> on a non-overt-act conspiracy charge, the indictment satisfies the requirements of the statute of limitations if the government alleges and proves, at trial or pretrial, that the conspiracy continued into the limitations

> period. We further hold that on conspiracy charges which require listing of overt acts, the statute of limitations is satisfied if the last overt act *alleged* and proved occurs within the limitations period.

792 F.2d at1532-33 (citations omitted) (emphasis added). The Eleventh Circuit also held that the day following the last overt act alleged in the indictment (in an overt act case) "is the beginning date for calculation" of the statute of limitations. *Id.* at 1533.

Completely contrary to these decisions, the two-judge majority of the Tenth Circuit's panel decision holds that boilerplate language in the indictment, contending that the conspiracy continued into the limitations period, was sufficient to save the indictment and remove the case from the purview of *Davis* and *Butler*. *See* App. A, pp. 12a-13a.

The language of the indictment that "saved" petitioner's conviction, according to the majority opinion, asserted that the petitioner

> [f]rom in or about March 1988, and continuing until in or about August 1989, the exact dates being unknown to the Grand Jury, . . . committed or caused to be committed various overt acts . . . including, but not limited to [the alleged five overt acts].

See App. D, pp. 40a & 41a.

The en banc Court's per curiam opinion notes that the analysis section of the panel majority's opinion was without precedent. App. E, p.45a. Nevertheless, by a 6-6 vote, the Court does not disturb the panel's opinion. Thus, in this case of first

impression, *see United States v. Hauck*, 980 F.2d 611, 613 (10th Cir. 1992), the Tenth Circuit refused to follow *Davis* and *Butler*. Rather, the Court found that because Count One of the indictment alleged Ms. Stoner "committed or caused to be committed various overt acts . . . including but not limited to," five specific but untimely overt acts listed in the count one and because count one alleges, in general terms, that the charged conspiracy continued "until in or about August 1989, the exact dates being unknown to the Grand Jury," the indictment was sufficient. Therefore, according to the Tenth Circuit, the general allegation of the conspiracy's ending date, though not specific nor tied to any particular overt act, is sufficient to satisfy the statute of limitations when read in conjunction with the boilerplate language indicating the list of specific overt acts alleged in count one is not exclusive.

Precise authority for the position taken by the Tenth Circuit is difficult to unearth. In fact, the Government candidly admitted on rehearing en banc that there is no single case directly on point supporting the panel view. The Government argued that its position is supported by *United States v. Schurr*, 794 F.2d 903 (3d Cir. 1986) and *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977). These cases provide no support for the position adopted by the Tenth Circuit.

In *Schurr*, the issue on remand was whether a timely overt act that was charged in the indictment was actually an act in furtherance of the conspiracy. 974 F.2d at 908. In other words, the task before the *Schurr* court was to determine the scope of the conspiracy and then to decide whether the timely overt act that appeared in the indictment was in furtherance of the conspiracy. Because the *Schurr* court was not required to decide whether an untimely overt act alleged in the indictment

could be substituted with proof of a timely overt act at trial, its conclusions in this regard are dicta.[1]

Likewise, *Harris* provides no support for the government's position. First, *Harris* is not a situation where the overt acts on which the government would rely to prove conspiracy were not disclosed to the defendant. 542 F.2d at 1290 ("[t]he district court ordered the Government to reveal, inter alia, the date, the time, and the place of each overt act"). Second, nothing in *Harris* suggests that the government failed to allege a timely overt act in the indictment. Furthermore, the

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[1] Four years before it considered *Schurr*, the Third Circuit decided *United States v. Steel*, 685 F.2d 793, *cert. denied*, 459 U.S. 908 (1982). *Steel* is an example of the folly that can result when the government is not required to specifically allege a timely overt act in a conspiracy prosecution. Unlike *Schurr*, the question before the court in *Steel* was whether the indictment was barred by the statute of limitations. *Id.* at 797. Although *Steel* is primarily a case where the defendants were denied notice of the government's theory of guilt, the court wrote:

> We are persuaded that in the circumstances of this complex case, the combination of these factors denied the defendants' due process right to a fair trial. First, it can be said that the defendants were denied reasonable notice and a fair opportunity to defend against the government's allegations. ***The district court should have required the prosecution prior to trial to announce specifically the factual basis for its contention that the conspiracy continued into the limitations period*** . . . .

Id. at 802 (emphasis added). Although the facts of *Steel* reveal that the government may have radically changed its theory of the case in final argument, that eventuality could not have been known to the district judge prior to trial. Thus the Third Circuit's admonishment of the district judge is significant and stands for the proposition that defendants are entitled, prior to trial, to know the factual basis supporting the government's allegation that a conspiracy continued into the limitations period. The language in the indictment in the instant case did not reveal such a factual basis.

indictment was not challenged on statute of limitations grounds. Rather, the question before the *Harris* court was whether statements of an alleged coconspirator should have been barred as hearsay. For such statements to be admissible, they must have been made while the conspiracy was ongoing. The court found that the government could establish ***the duration of the conspiracy*** with proof of overt acts that were not alleged in the indictment. *Id.* at 1301.

The concerns that are present in Ms. Stoner's case were not before the *Harris* court. As just noted, because the prosecution was required to announce prior to trial its factual basis for each overt act, the *Harris* court was not concerned with lack of notice concerning an element comprising the crime of conspiracy. More importantly, the facts in *Harris* did not implicate 18 U.S.C. § 3282, and accordingly the *Harris* court was not concerned with the government's ability, or lack thereof, to prosecute, try, or punish.

The Seventh Circuit relied on *Harris* in *United States v. Read*, 658 F.2d 1225 (1981), to hold that "[a]cts not alleged in the indictment may be proved to show [the defendant's] participation within the statute of limitations." In *Read,* the central focus was the propriety of jury instructions relative to a defendant's withdrawal from the conspiracy. One of the attacks lodged against the instruction was that it "erroneously allowed the jury to find that [the defendant] participated in the conspiracy after the limitations date by proof of overt acts not alleged in the indictment." *Id.* at 1232. In reaching its holding, the court noted that the indictment did not allege an overt act within the limitations period. *Id.* at 1237. Accordingly, it is conceded that *Read* directly addresses the issue of whether the government can rely upon overt acts not alleged in the indictment to satisfy the statute of limitations.

However, *Read* is not persuasive. The court in *Read* based its holding on *Harris*, *supra*, and *Worthington v. United States*, 1 F.2d 154 (7th Cir. 1924), neither of which concerned a statute of limitations question.[2] Without discussion or analysis, the court extended the holdings of *Harris* and *Worthington* into the statute of limitations arena. Because the cases relied upon by *Read* do not consider statute of limitations concerns, the extension is dubious.

More than dubious, leaving this precedent in place – a precedent contrary to *Butler* and *Davis* – is dangerous for several reasons, all noted by Judge Briscoe in her dissent.

Judge Briscoe gave several compelling reasons for rejecting the majority's position:

> First, the majority has failed to cite a single case in support of its conclusion that the allegations upon which it relies, i.e. the boilerplate language indicating the overt acts alleged in the indictment are not exclusive and the general allegations of the conspiracy's ending date, are sufficient to satisfy the statute of limitations in a case involving an overt act conspiracy charge. Second, because these types of allegations are present in virtually all federal conspiracy

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[2] In *Worthington*, the defendant claimed that his acquittal of certain substantive counts invalidated his conspiracy conviction. The court found that even if it agreed with the defendant's rationale – which it did not – the record was "teeming with acts committed in furtherance of the object of the conspiracy." 1 F.2d at 155. The court then pointed out that the jury was not limited to considering only overt acts charged in the conspiracy count, a circumstance *not* present in the instant case, and concluded that "[o]vert acts not charged in the indictment may be proved on the trial." *Id.* (citations omitted).

indictments, the majority's holding will effectively prevent any defendant from ever mounting a successful challenge to the timeliness of an overt act conspiracy charge. In fact, the majority's holding will arguably invite prosecutors to pursue outdated conspiracy charges by simply alleging in an indictment, in a general manner, that a conspiracy continued into the statutory limitations period and that various unlisted overt acts occurred within the limitations period. *See generally Grunewald [v. United States]*, 353 U.S. [391] at 404 [1957] ("Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions."). Third, the majority's approach will allow the government to prosecute a defendant on the basis of facts not presented to a grand jury. *See United States v. Wood*, 958 F.2d 963, 974 (10th Cir. 1992) (holding that "an indictment must allege sufficient facts to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury."). Presumably, if a grand jury is able to determine the ending date of a conspiracy, it has before it some evidence of the final overt act in furtherance of that conspiracy. Here, count 1 of the indictment alleged the conspiracy spanned a period from "in or about March 1988" to "in or about Agust 1989." Thus, in addition to alleging the ending date, it does not seem unreasonable or "hyper-technical" to require the indictment to describe, with some degree of particularity, the overt act that gave rise to the grand jury's conclusion that the conspiracy's ending date (or, at a minimum,

> some other *timely* overt act). Fourth, the majority's approach could effectively preclude a trial court from dismissing an indictment prior to trial. Specifically, in cases that are filed close to the end of the limitations period, the general pleading of the month and year in which the conspiracy ended would not be sufficient to allow the trial court to determine, with particularity, whether the conspiracy charge was timely. Accordingly, the trial court would have to wait until after the government's case-in-chief to determine whether the evidence of a timely overt act had been introduced. Thus, it is conceivable that a defendant could be put to the time, expense, and public humiliation of a criminal trial, only to have the trial court eventually determine that the charge was untimely. Finally, it is conceivable that the majority's approach would violate a defendant's Sixth Amendment right to reasonable notice of criminal charges. In particular, there is no explanation of how the ending date of a conspiracy allows a defendant to reasonably anticipate what overt act evidence will be presented at trial. *See, e.g., United States v. Pinto*, 838 F.2d 426, 433 (10th Cir. 1988) (discussing effect of a variance between a conspiracy as charged and evidence adduced at trial).

App. A, pp. 25a-27a.

Judge Briscoe's dissent is well-reasoned and presents the better view. It follows the Fifth and Eleventh Circuits which hold that in conspiracy cases, a timely overt act must be *alleged*

and proved. This is not a hyper-technical requirement; it is rational, just, and fair.

Assuming, arguendo, that the government's failure to allege a timely overt act in the indictment does not render the conspiracy count fundamentally defective, Ms. Stoner's conviction nevertheless must not be permitted to stand. Heretofore, the government has argued that evidence, other than evidence concerning the stale overt acts alleged, should be considered in support of the conspiracy charge.

However, the government's position is inconsistent with the jury instructions. Instructions No. 13 and 18 limited the jury's consideration to the specific overt acts charged in the indictment. Therefore, the government is prohibited from procuring a timely overt act necessary to save the conspiracy conviction from the remaining evidence produced at trial.

Instruction No. 13 provided in relevant part:

> In order to establish the offense of conspiracy, the government must prove each of the following essential elements beyond a reasonable doubt:
>
> . . . .
>
> (4) that one of the coconspirators thereafter knowingly committed at least one of the overt acts *charged in the Indictment*, at or about the time and place alleged. . . .

(Emphasis added.)

Instruction No. 18 provided in part:

> You are instructed that the overt act element is satisfied if the government proves that at least one of the overt acts *charged in the Indictment* was knowingly committed by one of the coconspirators during the course of the conspiracy in furtherance of some object of the conspiracy.

(Emphasis added.) The government did not object to either instruction. The instructions are contrary to the government's suggestion that the jury, to properly convict Ms. Stoner, may have considered acts not specifically listed as overt acts in the indictment.

Assuming that the jury instructions did not act to limit the jury's consideration to only the overt acts listed in the indictment, the instructions certainly allowed the jury to convict on the conspiracy count without finding any act in addition to those listed as overt acts in the indictment. Accordingly, the jury instructions do not foreclose the possibility that the jury convicted Ms. Stoner on the basis of an untimely overt act or acts.

This possibility requires reversal. In *Yates v. United States*, 354 U.S. 298 (1957), the defendants were convicted of conspiracy to violate the Smith Act by advocating the overthrow of the government and organizing persons to join them. This Court held the allegation that the defendants conspired to organize persons was barred by the statute of limitations. *Id.* at 311. The Court observed that the jury instructions did not clearly require the jury to find the defendants conspired to both advocate and organize. *Id.*

Moreover, the Court noted that the jury was required to find an overt act, and there was "no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy." *Id.* 311-12.

As the Court stated, "[i]n these circumstances . . . the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected." *Id.* at 312 (citations omitted).

Ms. Stoner's conspiracy conviction must be reversed under *Yates*. Whether the jury based the conspiracy conviction on the untimely overt acts listed in the indictment is unknown. The instructions directed the jury's attention only to the overt acts "charged in the Indictment." The instructions never informed the jury that it could consider other uncharged or unalleged acts in its determination of the overt act element.

Therefore, under the instructions given, the jury likely believed that its consideration of the overt acts element was limited only to the overt acts listed in the indictment. Assuming a worst-case scenario from Ms. Stoner's perspective, the instructions clearly told the jury that it need find no more than one of the untimely overt acts listed in the indictment to return a guilty verdict on the conspiracy charge. This possibility alone is enough under *Yates* to require reversal.

Accordingly, there is at least a possibility that the conspiracy conviction was based on an improper ground. Because the improper ground at issue is one of legal insufficiency – overt acts outside the limitations period – and does not touch upon factual insufficiency, Ms. Stoner's conspiracy conviction must be reversed. *Compare Griffin v.*

United States, 502 U.S. 46, 51-56 (1991) (limiting *Yates* to legal insufficiency cases).

Certiorari review of the Tenth Circuit's decision is therefore appropriate, warranted, and necessary.

CONCLUSION

To resolve this conflict between the United States Courts of Appeal, Cynthia M. Stoner respectfully prays that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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